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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Plaintiff and Appellant,

v.

ADP MARSHALL, INC. et al.,

Defendants and Respondents.

E041182

(Super.Ct.No. RIC384278)

OPINION

APPEAL from the Superior Court of Riverside County. Craig Riemer and Gary B. Tranbarger, Judges.[1] Affirmed.

Clausen Miller and Jay D. Harker for Plaintiff and Appellant.

London Fischer, Richard S. Endres, Scott P. Cranny; Cooksey, Toolen, Gage, Duffy & Woog, Patrick A. Duffy, Joseph Helgeson; Koeller Nebeker Carlson & Haluck, Keith D. Koeller and Robert A. Fisher for Defendants and Respondents.

[1] Judge Tranbarger granted the motion for summary judgment. Judge Riemer then entered the judgment.

This case revolves around two construction contracts relating to the same construction project. Both contracts included waivers of the right to recover damages against other entities involved in the project, to the extent that those damages are covered by property insurance. The purpose and effect of these provisions, however, is not so much to bar recovery by the contracting parties themselves, as to bar recovery, on a subrogation theory, by their property insurers. Accordingly, we will follow the parties' lead and call these subrogation waivers.

Unfortunately, even though the contracts were based on standard form contracts promulgated by the American Institute of Architects (AIA), the subrogation waivers in them were not identical. Moreover, both contracts contained more than one subrogation waiver. One subrogation waiver in particular was explicitly limited to "damages covered by any property insurance *during construction* . . . ." (Italics added.) The others were not. The key issue, then, is whether any of the subrogation waivers, in any of the contracts, have the effect of waiving claims for damages, covered by property insurance, that occurred more than four years after construction was complete.

Appellate counsel for both sides have done an outstanding job, resulting in briefs that have been more than ordinarily helpful to the court. The fact remains that the issues are far from enthralling; they demand an almost microscopic examination of dry, lengthy contract documents. As we embark on the resolution of these issues, then, we think it only fair to suggest that the reader might want to be sitting in a comfortable chair, with a cup of strong coffee nearby.

I

FACTUAL BACKGROUND

In 1994, International Rectifier Corporation (the Owner) contracted for the construction of an addition to its semiconductor manufacturing plant in Temecula.

A. *The Architect Agreement*.

On April 19, 1994, the Owner entered into a contract with ADP Marshall, Inc. (the Architect). That contract (the Architect Agreement) consisted of a "Standard Form of Agreement Between Owner and Architect" (AIA Document B141/CM, 1980 edition), which incorporated a form entitled "General Conditions of the Contract for Construction" (AIA Document A201/CM, 1980 edition). The parties modified both forms for purposes of this particular project.

The "Standard Form" portion provided:

"**11.4** The Owner and the Architect waive all rights against each other, and against the contractors . . . of the other, for damages covered by any property insurance *during construction*, as set forth in [the "General Conditions" portion] . . . . The Owner and the Architect shall each require appropriate similar waivers from their contractors . . . ."[2] (Italics added.)

"**13.1** This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or

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[2] The parties modified this standard provision by adding: "[T]his waiver is limited to the amount paid by the insurance company for each claim."

agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and the Architect."

In addition, the "General Conditions" portion provided:

"**11.3.1** . . . [T]he Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof . . . ."

"**11.3.6** The Owner and Contractor waive all rights against (1) each other and the Subcontractors, . . . and (2) the Architect . . . for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 11.3 or any other property insurance applicable to the Work . . . . The Owner or the Contractor, as appropriate, shall require of the Architect [and] Subcontractors . . . similar waivers each in favor of all other parties enumerated in this Subparagraph 11.3.6."

"Work" was defined as "the completed construction required of the Contractor by the Contract Documents . . . ."

B. *The Contractor Agreement.*

On or after July 11, 1994, the Owner entered into a contract with McCarthy Western Constructors, Inc. (the Contractor). That contract (the Contractor Agreement) consisted of a "Standard Form of Agreement Between Owner and Contractor" (AIA Document A111, 1987 edition), which incorporated a form entitled "General Conditions of the Contract for Construction" (AIA Document A201, 1987 edition). The parties modified both forms for purposes of this particular project.

The "Standard Form" portion provided:

"1.1 The Contract Documents consist of this Agreement [and] other documents listed in this Agreement . . . ; these form the Contract, and are as fully a part of the contract as if attached to this Agreement or repeated herein."

"14.3.11 The Owner shall retain an Architect . . . . The Architect[]'s services, duties and responsibilities are described in the Agreement between the Owner and the Architect . . . , a copy of which will be furnished to the Contractor.";

In addition, the "General Conditions" portion provided:

"**11.3.1** Unless otherwise provided, the ~~Owner~~ Contractor shall purchase and maintain . . . property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site . . . . Such property insurance shall be maintained . . . until final payment has been made . . . or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier."

"**11.3.3 Loss of Use Insurance**. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor [and] the Subcontractors . . . for loss of use of the Owner's property, including consequential losses due to fire or other hazards[,] however caused."

"**11.3.5** If during the Project construction period the Owner insures properties . . . adjoining or adjacent to the site by property insurance under policies separate from those

insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation . . . ."

"**11.3.7 Waivers of Subrogation**. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, . . . and (2) the Architect . . . for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work . . . . The Owner or Contractor, as appropriate, shall require of the Architect . . . similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity . . . whether or not the person or entity had an insurable interest in the property damaged."

"Work" was defined as "the construction and services required by the Contract Documents, whether completed or partially completed . . . ."

C. *The Subcontractor Agreement*.

On August 6, 1994, the Contractor entered into a contract with University Mechanical and Engineering Contractors, Inc. (the Subcontractor) for specified mechanical work on the Project, including the installation of a water chiller.

The project was substantially completed on or about June 6, 1995.

On December 1, 1999, a strainer in a water chiller system failed. As a result, water escaped and caused extensive property damage. This property damage was covered under a property insurance policy that American Guarantee & Liability Insurance Company (the Insurer) had issued to the Owner. As a result of this incident, the Insurer paid the Owner $3,707,036.32 in insurance benefits.

II

PROCEDURAL BACKGROUND

In this action, the Owner and the Insurer, as subrogee of the Owner, asserted causes of action against the Architect, the Contractor, and the Subcontractor, as well as other defendants who are not parties to this appeal, for negligence and breach of contract.

The Contractor, the Architect, and the Subcontractor (hereafter defendants) filed motions for summary judgment, arguing that the subrogation waiver in the Contractor Agreement barred the Insurer from recovering against them.

The trial court granted the motions for summary judgment. It explained:

"On the question of whether or not the [Contractor Agreement] was modified by the [Architect Agreement], there's no triable issue of fact on that. It was not. There's no expression of such intent anywhere. The logic propounded by [the Insurer] is tortured at best to get to that result. The most obvious counterfact . . . is the [Contractor Agreement] was signed months after the [Architect Agreement]. One would think that whichever one they signed last was the one they honestly wanted to go with.

"[S]econd . . . , the logic of a waiver of subrogation clause requires that such waiver be universal and reciprocal among all relevant parties. If it's not . . . , then you have a mess. You're just inviting a hornet's nest of litigation and confusion unless you make such clauses apply to all parties . . . .

"Is the [A]rchitect a third-party beneficiary of the clause? Yes, notwithstanding the fact the [A]rchitect had a separate agreement which was an integrated document; notwithstanding the fact that the [A]rchitect's separate contract had a clause that was different in scope from the [Contractor Agreement]. The [A]rchitect was expressly referenced in the [Contractor Agreement]. And as I just stated, the logic of these clauses only makes sense if everybody has the same clause."

The Owner and the Insurer filed a motion for new trial, arguing, among other things, that they had been taken by surprise by certain additional evidence that defendants had submitted with their reply papers. They submitted additional evidence of their own to counter defendants' additional evidence.

The trial court ruled: " . . . I agree that it would be appropriate to have the Court consider the declarations, so in that sense my [ruling] would be to grant the motion for new trial. By having considered these new declarations, my decision would be the same."

The trial court therefore entered judgment in favor of defendants and against the Insurer.[3]

III

THE PROPER CONSTRUCTION OF THE SUBROGATION WAIVERS

A. *General Background Principles*.

"'"'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.]" [Citation.]'" (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415, quoting *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390, quoting *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868, quoting *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 & *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

Contract language "is ambiguous when it can have two or more reasonable constructions. [Citation.]" (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763.) "'"[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the

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[3] It quite properly did not enter judgment against the Owner, presumably because other claims between the Owner and defendants were still pending.

abstract."' [Citation.]" (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1118, quoting *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1265.)

In general, on a motion for summary judgment, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843,quoting Code Civ. Proc., § 437c, subd. (c).) However, "'[i]t is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence.' [Citation.]" (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527, quoting *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439.) "'The possibility that conflicting inferences can be drawn from uncontroverted evidence does not relieve the appellate court of its duty independently to interpret the instrument . . . .' [Citation.]" (*Culligan v. State Comp. Ins. Fund* (2000) 81 Cal.App.4th 429, 434 [appeal from summary judgment], quoting *Estate of Dodge* (1971) 6 Cal.3d 311, 318.) "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 845.)

Thus, to the extent that our review is based on the applicable written contracts alone (see parts III.C.1, III.C.2.a and V, *post*), our review is de novo. (*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 532 [appeal from summary

judgment].) To the extent that it is based not just on the contracts, but also on the limited extrinsic evidence that was proffered by the parties (see part III.C.2.b, *post*), that extrinsic evidence was not in conflict; accordingly, once again, our review is de novo. (*Nava v. Mercury Casualty Co.* (2004) 118 Cal.App.4th 803, 805 [appeal from summary judgment].)

B. *The Architect Agreement.*

The Insurer simply assumes that the subrogation waiver in the Architect Agreement is limited to damages covered by property insurance "during construction." It then argues that the subrogation waiver in the Contractor Agreement must likewise be construed as so limited, essentially because: (1) the Contractor Agreement incorporated the Architect Agreement by reference; (2) the two contracts must be construed together; (3) the specific language in the Architect Agreement must prevail over the general and/or ambiguous language in the Contractor Agreement; and (4) extrinsic evidence indicates that the parties intended the two subrogation waivers to be consistent.

Defendants have never questioned the Insurer's assumption. Instead, they have relied on the Contractor Agreement and have simply argued that the Insurer's arguments for construing it in accordance with the Architect Agreement are not well taken. The fact is, however, that the Architect Agreement contains not one, but two subrogation waivers -- (1) one in the "Standard Form" portion, by the Owner and the Architect, which contains the words "during construction," and (2) one in the "General Conditions" portion, by the Owner alone, which does not.

It seemed to us that, when these were construed together and in the light of the Architect Agreement as a whole, it was at least arguable that the Owner's subrogation waiver (as opposed to the Architect's) was not limited to damages during construction. We therefore requested further briefing from the parties on this issue. Somewhat to our surprise, the *Insurer* did not object to us reaching this issue; *defendants*, however, took the position that we should not reach this issue because it had not been raised in the trial court. We will defer to defendants' wishes and assume -- without deciding -- that the Owner's subrogation waiver in the Architect Agreement is limited to damages covered by property insurance "during construction."

C. *The Contractor Agreement*

1. *The Contractor Agreement, standing alone.*

We begin with how the subrogation waiver in the Contractor Agreement should be construed when viewed by itself, separate and apart from the Architect Agreement. The Insurer contends that it, too, must be construed as applicable only during construction or, at least, that it is ambiguous on this point.

To recapitulate somewhat, the subrogation waiver in paragraph 11.3.7 applied to "damages . . . to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 *or* other property insurance applicable to the Work . . . ." (Italics added.) "Work" was defined as "the construction and services required by the Contract Documents, whether completed or partially completed . . . ."

"[P]roperty insurance obtained pursuant to this Paragraph 11.3" would include insurance obtained pursuant to paragraph 11.3.1, which provided: "Unless otherwise provided, the Contractor shall purchase and maintain . . . property insurance . . . for the entire Work at the site . . . . Such property insurance shall be maintained . . . until final payment has been made . . . or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier."

"[P]roperty insurance obtained pursuant to this Paragraph 11.3" would also include insurance obtained pursuant to paragraph 11.3.5, which provided: "[I]f after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance."

The insurance at issue here clearly was not obtained pursuant to paragraph 11.3.1. The Insurer takes the position that it also was not obtained pursuant to paragraph 11.3.5. Its contention is that property insurance is "to be provided" if, and only if, there is a contractual obligation to provide it; in this case, neither the Owner nor the Contractor had a contractual obligation to provide property insurance once the construction period was over. Even assuming, however, that the insurance was not "property insurance obtained pursuant to this Paragraph 11.3," it was still "other property insurance applicable to the Work." This is true because the "Work" was defined as including completed

construction. There would be no reason to include this alternative formulation unless it extends to *some* insurance *other than* "insurance obtained pursuant to this Paragraph 11.3." Moreover, this alternative formulation is not ambiguous.

We also note that paragraph 11.3.7 provided that "[a] waiver of subrogation shall be effective as to a person or entity . . . whether or not the person or entity had an insurable interest in the property damaged." Thus, it was intended to be effective even after the end of the construction period, when the Architect and the Contractor would no longer have an insurable interest. It cannot be argued that this "insurable interest" language in paragraph 11.3.7 was necessary to apply to damages covered by insurance under paragraph 11.3.5 -- i.e., insurance "to be provided" after the end of the construction period -- because paragraph 11.3.5 contained its own separate subrogation waiver.

At least three cases involving substantially similar AIA form construction contracts have come to the same conclusion. (*Midwestern Indem. Co. v. Systems Builders* (Ind.App. 2004) 801 N.E.2d 661, 667-669; *Lowder Const.* (Ga.App. 2002) 567 S.E.2d 389, 393-394; *Town of Silverton v. Phoenix Heat Source* (Colo.App. 1997) 948 P.2d 9, 13.) The Insurer, however, understandably relies on *Lumbermens Mut. Cas. Co. v. Grinnell Corp.* (D.Mass. 2007) 477 F.Supp.2d 327. There, the court stated: "The waiver of subrogation clause . . . applies only with respect to property insurance obtained pursuant to Paragraph 11.[3] of the Conditions or other insurance 'applicable to the Work.' The 'Work' is defined as 'the construction and services required by the Contract Documents, whether completed or partially completed'. Although the definition of the

'Work' includes 'completed' services, § 11.[3].1 requires that property insurance shall be maintained 'until final payment has been made' . . . . Under § 11.[3].7, therefore, the parties waive subrogation rights only with respect to damage occurring before final payment has been made . . . . [Citation.]" (*Id.* at p. 331.)

Quite frankly, this reasoning just does not add up. The court acknowledged that the subrogation waiver applied to *either* property insurance obtained pursuant to a contractual requirement *or* other insurance applicable to the "Work." It further acknowledged that the "Work" included "completed" services. (Actually, as here, it also included completed *construction*.) We have scoured the opinion for some inkling as to why the subsequent insurance was not "other insurance 'applicable to the Work,'" but without success. We therefore decline to follow *Lumbermans Mut. Cas. Co*.

The Insurer also invokes the principle of *eiusdem generis*. Under this principle, "the enumeration of specific items or factors will be controlling over general statements placed before or after the list of specific items or factors. [Citation.] In other words, 'the general term or category is "restricted to those things that are similar to those which are enumerated specifically."' [Citation.]" (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013, quoting *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7.) Here, however, there is no list of specific items. There are just two items -- "property insurance obtained pursuant to this Paragraph 11.3" and "other property insurance applicable to the Work." Neither is any more general or specific then the other.

The Insurer also argues that, if "other property insurance applicable to the Work" does include postconstruction insurance, then the separate subrogation waiver with respect to postconstruction insurance in paragraph 11.3.5 is surplusage. The problem is that *something* has to be surplusage. If -- as in the Insurer's view -- the subrogation waiver in paragraph 11.3.7 applies only to damages covered by "property insurance obtained pursuant to this Paragraph 11.3," then why does it state that it also applies to damages covered by "other property insurance applicable to the Work"?[4]

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[4] In fairness to the Insurer, it does try to answer this question. It argues that insurance "*obtained* pursuant to this Paragraph 11.3" necessarily means *new* policies purchased for the specific project. "Other property insurance applicable to the Work," then, refers to any *preexisting* policies that may happen to apply to the project: "e.g., an owner's existing all-risk property policy or a contractor's existing master builder's risk policy, which would not necessarily be 'obtained' pursuant to the contract since they would already exist . . . ."

The Insurer does not dispute, however, that the parties can satisfy their obligations to "purchase" insurance under paragraph 11.3 with preexisting insurance. For example, paragraph 11.2.1 also uses the word "purchase," as follows: "The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance . . . against claims which may arise from operations under the Contract." It follows that preexisting insurance can be insurance "*obtained* pursuant to this Paragraph 11.3."

Admittedly, *Employers Mut. Cas. Co. v. A.C.C.T., Inc.* (Minn. 1998) 580 N.W.2d 490 does seem to have construed "property insurance obtained pursuant to this Paragraph 11.3" as limited to new insurance. (See *id*. at p. 493.) It therefore construed "other property insurance applicable to the Work" as including -- although not necessarily limited to -- preexisting property insurance used to satisfy a party's obligations under paragraph 11.3. (*Ibid*.) However, it relied on paragraph 11.3.1, which stated, "'[*u*]*nless otherwise provided*, the Owner [must] purchase * * * property insurance upon the entire Work at the site to the full insurable value thereof' (emphasis added) . . . ." (*Ibid*.) The court read this as meaning "unless *the Owner* otherwise provides *insurance*." (*Ibid*.) If this reading were correct, the AIA form would have used the same wording at the beginning of *every* paragraph that obligates a party to "purchase" insurance, including

[footnote continued on next page]

In determining *which* language is surplusage, we look to the purpose of subrogation waivers in construction contracts, which is "to assure that, to the extent any loss is covered by a policy, the insurer should bear the risk of loss, regardless of any fault on the part of one or both of the parties. Another purpose is to prevent a potential windfall to the insurer subrogated to the rights of the insured against the other parties to the contract." (*SAIF v. Fama Const. Co.* (N.J.Super.L. 2001) 801 A.2d 459, 464, affd. (N.J. Super. 2002) 801 A.2d 334.) They also "cut down the amount of litigation that might otherwise arise due to the existence of an insured loss." (4 Bruner & O'Connor, Construction Law (2007) Insurance, § 11:100.)

Subrogation waivers in no way unfairly prejudice insurers. "Because the insurer presumably has considered the risk of loss in establishing its premiums, the insurer should not have the ability to recoup that loss by subrogation against the other parties allegedly causing the loss." (*SAIF v. Fama Const. Co.*, *supra*, 801 A.2d at p. 464.) "Viewed globally, these clauses make sense as an insurer on one project might very well be denied recovery by such a clause but benefit from the existence of such a waiver on

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[footnote continued from previous page]
liability insurance and boiler and machinery insurance. We therefore read it as meaning "unless *the contract documents* otherwise provide." Our reading finds support in paragraph 11.3.1.4, which specifically states, "Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site . . . ."

Finally, even assuming that "property insurance obtained pursuant to this Paragraph 11.3" means only new policies, "other property insurance applicable to the Work" is so broad, general, and unqualified that we see no way to read it as limited to policies that are both (1) preexisting and (2) used to satisfy a party's obligations under paragraph 11.3.

another project." (4 Bruner & O'Connor, Construction Law, *supra*, § 11:100.) Accordingly, subrogation waivers "have been liberally construed. [Citations.]" (*Willis Realty v. Cimino Const.* (Me. 1993) 623 A.2d 1287, 1288-1289.)

The AIA form contract evinces the intent to shift the risk of loss to insurance to the maximum extent possible. "The AIA has chosen . . . to put the ultimate loss on the property insurer . . . ." (2 Sweet on Construction Industry Contracts (4th ed. 1999) Insurance & Bonds, § 22.04[M] at p. 783.) "The AIA has made a strenuous effort to bar subrogation claims by having participants waive any claims the participants may have against other participants." (*Id.* at pp. 779-780.) Whenever "loopholes" in the waiver have appeared, the AIA has changed its forms "to try to close" them and ultimately "to kill subrogation off." (*Id*. at p. 783; see *id*. at pp. 780-783.)

What possible reason could the parties have for shifting losses to insurance during construction, but not after construction? And why would they want to carve out that exception to the overall loss-shifting scheme when it benefits only the insurer? There is no benefit to the owner; it is made whole by the insurance proceeds. There is no benefit to the contractor, the subcontractors, or the other parties involved; they may be roped into protracted litigation, months or even years after they thought they had left the project behind.

On the other hand, it makes perfect sense that the parties might provide overlapping, even duplicative subrogation waivers. The AIA form subrogation waivers are the end product of a process of gradually expanding the scope of the waivers, while

patching gaps in that scope as they appeared. Thus, it is not surprising that one subrogation waiver that applies postconstruction appears in paragraph 11.3.5, while another appears in paragraph 11.3.7.

We therefore conclude that, when the Contractor Agreement is construed standing alone, the subrogation waiver in paragraph 11.3.7 unambiguously bars the Insurer's subrogation claims. We turn to whether extrinsic evidence, including but not limited to the Architect Agreement, would support any other conclusion.

2. *The Contractor Agreement, construed together with the Architect Agreement*.

a. *Incorporation by reference*.

"Incorporation by reference requires that (1) the reference to another document was clear and unequivocal; (2) the reference was called to the attention of the other party, *who consented to that term*; and (3) the terms of the incorporated documents were known or easily available to the contracting parties. [Citation.]" (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 765, italics added.) "The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.' [Citations.]" (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54, quoting *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 643.)

The Contractor Agreement is very specific concerning the documents that are incorporated into it. Paragraph 1.1 defines the "Contract Documents" as "this

Agreement, Conditions of the Contract . . . , Drawings, Specifications, Addenda issued prior to execution of this Agreement, *other documents listed in the Agreement* and Modifications issued after execution of this Agreement; these form the Contract . . . . *An enumeration of the Contract Documents . . . appears in Article 16*." (Italics added.) Article 16 does not list the Architect Agreement. It does specifically list "Other Documents . . . forming part of the Contract Documents," but this list does not include the Architect Agreement.

The Insurer relies on paragraph 14.3.11, which provides: "The Owner shall retain an Architect . . . . The Architect[]'s services, duties and responsibilities are described in the Agreement between the Owner and the Architect . . . , a copy of which will be furnished to the Contractor. Any changes made to the Agreement between the Owner and the Architect . . . shall be provided to the Contractor by a timely written notification." A representative of the Owner (David Martin) testified that a representative of the Contractor (Frank Pasztor) requested that paragraph 14.3.11 be included, "to define the contractual interrelationships between the three parties." To that end, this paragraph simply requires that the Contractor be informed of the terms of the Architect Agreement. It does not mean that the Contractor consented to those terms in any way. To the contrary, it indicates that the Owner and the Architect can change them without the Contractor's consent.

The Insurer also relies on paragraph 4.2.10, which provides: "If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in

carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives *shall be as set forth in an exhibit to be incorporated* in the Contract Documents." (Italics added.) The Insurer argues that the only document setting forth the duties and responsibilities of the Architect's project representative was the Architect Agreement itself.

Whatever document the parties were talking about, they never actually attached it as an exhibit to the Contractor Agreement. Despite this, it seems clear that paragraph 4.2.10, which is part of an AIA standard form, is actually referring to another AIA standard form -- AIA Document B352, entitled "Duties, Responsibilities and Limitations of Authority of the Architect's Project Representative." (Capitalization altered.) This is a one-page document that was attached to, and expressly incorporated into, the Architect Agreement. Accordingly, the Contractor Agreement incorporated, at most, this one single page of the Architect Agreement. It did not incorporate the Architect Agreement as a whole.

b. *Construction together*.

Under Civil Code section 1642, "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Here, the Architect Agreement and the Contractor Agreement were not between the same parties; thus, Civil Code section 1642, by its terms, does not apply.

More generally, however, "where two or more written instruments are executed contemporaneously, with reference to each other, for the purpose of attaining a

preconceived objective, they must all be construed together and effect given if possible to the purpose intended to be accomplished; and this principle controls whether each of the several instruments was signed by all or only some of the parties to the transaction. [Citation.]" (*Goodman v. Severin* (1969) 274 Cal.App.2d 885, 895.) And "[s]everal documents concerning the same subject and made as part of the same transaction will be construed together even if the documents were not executed contemporaneously. [Citation.]" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 967.)

"'While it is the rule that several contracts relating to the same matters are to be construed together [citation], it does not follow that for all purposes they constitute one contract.'" (*Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1300, quoting *Malmstedt v. Stillwell* (1930) 110 Cal.App. 393, 398.) The rule is simply a particular application of the more general principle that "[w]e construe [a] contract in light of the circumstances under which it was made . . . . [Citation.]" (*Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679, 683; see also Civ. Code, § 1647; Code Civ. Proc., § 1860.)

As the trial court pointed out, the Architect Agreement was executed earlier than the Contractor Agreement -- in fact, about three months earlier. The parties to the Architect Agreement had used 1980 AIA forms, yet the parties to the Contractor Agreement chose to use the somewhat different 1987 AIA forms. This suggests an intention that the later agreement supersede the earlier one, to the extent that they were

inconsistent. Moreover, as we discussed in part III.C.1, *ante*, it strains credulity to suppose that the parties intended any discrepancies to be resolved to the benefit of the Insurer.

A representative of the Owner (Ian Warbrick) testified, "It was my intention that the legal terms of the [Architect Agreement] and the [Contractor Agreement] be similar and consistent. We used AIA forms as guidelines to help ensure similarities and consistency. That was [the Owner]'s intent, and it was my view at the time that we achieved that objective." There was no evidence, however, that the Owner ever communicated this intent to the Contractor. The Owner did give the Contractor a copy of the Architect Agreement before the Contractor Agreement was signed. Thus, the Contractor was aware that the Owner was proposing to use a different AIA form. This *objective* manifestation of an intent that the agreements be *dissimilar* prevails over the Owner's undisclosed *subjective* intent that the agreements be *similar*. (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133; *Security Pac. Nat. Bank v. Matek* (1985) 175 Cal.App.3d 1071, 1075.)

The Insurer notes that the subrogation waiver in the Contractor Agreement required the Owner or the Contractor to procure a "similar waiver[]" from the Architect. It argues that, because the Architect's own subrogation waiver contained the "during construction" language, the parties must have understood the subrogation waiver in the Contractor Agreement to be "similar" -- i.e., similarly limited. Moreover, Warbrick

testified that he intended the subrogation waiver in the Architect Agreement to be the "similar waiver" required by the Contractor Agreement.

"Similar," however, does not mean identical. As long as there was *some* subrogation waiver by the Architect, the Contractor had little reason to care whether it contained the words, "during construction." The Contractor would want the Architect to execute a subrogation waiver for one reason only -- in case a property insurer came after the Contractor to recover money that it had already paid to the Architect. The Architect, however, was unlikely to have any continuing insurable interest, and hence unlikely to be paid any insurance money, after construction. Accordingly, the Contractor would reasonably regard the subrogation waiver in the Architect Agreement as sufficiently "similar" to the subrogation waiver in the Contractor Agreement. By contrast, both the Contractor and the Architect would want the Owner's waiver of subrogation to be effective even *after* construction, because the Owner *would* continue to have an insurable interest; thus, it would be the Owner's insurer that would be most likely to come after the Contractor or the Architect for postconstruction damages.

In sum, then, even when we construe the Contractor Agreement in light of the Architect Agreement, and even when we construe it in light of the Insurer's proffered extrinsic evidence, we still conclude that the subrogation waiver in the Contractor Agreement bars the Insurer's claims.

IV

THE ARCHITECT'S RIGHT TO THE BENEFITS OF THE SUBROGATION WAIVER IN THE CONTRACTOR AGREEMENT

The Insurer contends that the Architect is bound by the "during construction" limitation on the subrogation waiver in the Architect Agreement, even if the Contractor and the Subcontractor are not. It argues that, because the Architect Agreement was integrated, the Architect cannot claim to have broader rights under the Contractor Agreement.

"The parol evidence rule . . . establishes that the terms contained in an integrated written agreement may not be contradicted by *prior or contemporaneous* agreements." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344, italics added.) Here, however, the Contractor Agreement was entered into after, not prior to or contemporaneously with, the Architect Agreement. The Architect Agreement did not preclude the Owner from giving the Architect greater rights later, in exchange for new consideration provided by the Contractor.

Admittedly, the Architect Agreement did also provide, "This Agreement may be amended only by written instrument signed by both the Owner and the Architect." The Contractor Agreement, however, was not an amendment to the Architect Agreement. Rather, it was a separate agreement between the Owner and the Contractor. Under standard third party beneficiary principles (see *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 559-560), the Architect was a third party beneficiary of the

Contractor Agreement. (*Butler v. Mitchell-Hugeback, Inc.* (Mo. 1995) 895 S.W.2d 15, 21.)

In connection with this issue, both sides rely on *Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625. There, a securities industry employee (Cione) entered into an agreement with the National Association of Securities Dealers, Inc. (NASD) in which he agreed to arbitrate any disputes with his employer. (*Id*. at p. 630.) Three years later, he and his employer (FESCO) entered into a written employment agreement; it included an integration clause and did not address arbitration. (*Id*. at pp. 630-631.)

The appellate court held that the employer was a third party beneficiary of the arbitration clause: "Cione contends the superior court properly concluded his arbitration agreement with NASD . . . was rendered unenforceable by FESCO by virtue of the 'integration' clause of his written employment agreement with FESCO lacking any provision for arbitration. However, Cione's contention betrays a misunderstanding of the contract FESCO sought to enforce. FESCO did not seek to enforce its written employment agreement with Cione. Instead, as an intended third party beneficiary, FESCO sought enforcement of Cione's . . . agreement with NASD. [Citations.]" (*Cione v. Foresters Equity Services, Inc.*, *supra*, 58 Cal.App.4th at p. 636, fns. omitted.)

It further held that, even assuming the employment agreement was wholly integrated, it did not supersede the arbitration clause: "Evidence would be properly admissible '"to prove the existence of a separate . . . agreement as to any matter on which

the document is silent and is not inconsistent with its terms" . . . even though the instrument appeared to state a complete agreement. [Citations.]' [Citation.] Since the written employment agreement was silent on the forum for dispute resolution, Cione's . . . arbitration agreement with NASD was probative and admissible as not inconsistent with the terms of such employment agreement." (*Cione v. Foresters Equity Services, Inc.*, *supra*, 58 Cal.App.4th at p. 639, quoting *Masterson v. Sine* (1968) 68 Cal.2d 222, 226.) It "conclude[d] that by entering into the written employment agreement with Cione, FESCO did not waive its right to compel arbitration as a third party beneficiary of the arbitration clause contained in Cione's . . . agreement with NASD. Thus, the . . . arbitration clause was not superseded by Cione's separate written employment agreement with FESCO. [Citations.]" (*Cione*, at p. 640.)

Cione therefore supports our conclusion that here, the Architect is seeking to enforce the Contractor Agreement, as a third party beneficiary, rather than the Architect Agreement. Accordingly, such enforcement does not violate the provision limiting modification of the Architect Agreement.

The Insurer notes that, in *Cione*, the employment agreement was silent with respect to arbitration, whereas here, there was an actual inconsistency between the Architect Agreement and the Contractor Agreement concerning the duration of the subrogation waiver. It argues that *Cione* at least implies that an integration clause *does* bar any evidence of an *inconsistent* separate agreement. In *Cione*, however, it was the later agreement that contained the integration clause; here, it was the earlier agreement.

As we already discussed, an integration clause simply does not apply to a separate *later* agreement.

It is also significant that in *Cione*, the court relied on the fact that the later agreement was silent with respect to arbitration in concluding that the employer had not waived its right to compel arbitration under the earlier agreement. Here, by parity of reasoning, because the earlier agreement and the later agreement are inconsistent with respect to the duration of the subrogation waiver, we conclude that the Owner did "waive" the "during construction" limitation on its subrogation waiver.

V

THE INSURER'S RIGHT TO RECOVER

LOSS-OF-USE DAMAGES FROM THE ARCHITECT

The Insurer also argues that at least some of the $3,707,036.32 that it paid the Owner constituted loss-of-use damages, rather than property damages. The subrogation waiver in paragraph 11.3.7 of the Contractor Agreement applies only to damages covered by property insurance. Paragraph 11.3.3 of the Contractor Agreement, however, contains a separate subrogation waiver as against the Contractor and the Subcontractor -- but *not* as against the Architect -- for loss of use. The Insurer concludes that there is a triable issue of fact as to whether its claims against the Architect are barred.

The Insurer did not raise this particular argument below. To the contrary, it listed as undisputed the fact that it provided "property insurance coverage." When defendants listed the terms of paragraph 11.3.3, the loss-of-use provision, as a material fact, the

Insurer responded that this fact was "[i]rrelevant." Accordingly, the Insurer forfeited this argument as a ground for the denial of summary judgment. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872-873; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 263.)

The Insurer claims that we can reach this argument anyway because it raises only a question of law that is presented on undisputed facts. (See, e.g., *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) But that is not the case. It relies on the Owner's sworn proof of loss, which stated that its claim included "business interruption." Even so, if the Insurer had raised this issue below, it is conceivable that defendants could have shown either that this was a mistake, or else that for some other reason the $3,707,036.32 ultimately paid did not actually include any indemnity for loss of use. Thus, we cannot say that the predicate facts are undisputed.

However, even if the payment did include indemnity for loss of use, this argument lacks merit. Paragraph 11.3.3, dealing with loss of use, and paragraph 11.3.7, dealing with property insurance, are not alternative; rather, they are cumulative. This is apparent from the AIA form contract, when viewed both before and after the modifications the parties made to it.

In the original AIA form, section 11.3 is headed "Property Insurance." (Capitalization altered.) Paragraph 11.3.1 provides that the owner must purchase property insurance and maintain it during construction. Similarly, paragraph 11.3.2 provides that the owner must purchase boiler and machinery insurance and maintain it

during construction. By contrast, paragraph 11.3.3 provides that the owner *may* purchase insurance covering loss of use, and that the owner waives any claim against the contractor for loss of use. Finally, paragraph 11.3.7 provides that the owner waives any claim against the contractor *and* against the subcontractors and the architect for any damages *actually* covered by property insurance.

The owner may choose not to purchase loss-of-use insurance. The waiver in paragraph 11.3.7, standing alone, would apply only to losses that are actually covered by property insurance. Paragraph 11.3.3 contains a waiver separate from, and in addition to, the waiver in paragraph 11.3.7 so that, *even if* the owner chooses not to purchase loss-of-use insurance, the owner *still* cannot recover loss-of-use damages from the contractor. Nevertheless, if the owner *does* purchase loss-of-use insurance, that insurance is "property insurance" within the meaning of paragraph 11.3.7; and in that event, the owner still waives its rights to recover *any* damages, *including* for loss of use, from *any* of the protected parties, *including* the architect.

It is true that the parties made several ad hoc modifications to these provisions. First, they changed paragraph 11.3.1 to provide that the Contractor, rather than the Owner, must purchase property insurance and maintain it during construction. Second, they changed paragraph 11.3.3 so that the Owner waives any claim, not only against the Contractor, but also against all subcontractors, for loss of use. But neither of these changes affects our analysis. It remains true that, if the Owner does purchase loss-of-use

insurance, then under paragraph 11.3.7, it waives any claim for loss of use as against the Contractor, all subcontractors, *and* the Architect.

We must disagree with *Best Friends Pet Care v. Design Learned* (Conn.App. 2003) 823 A.2d 329, which came to exactly the opposite conclusion. There, after a fire, the owner's insurer reimbursed the owner for both physical damage to its building and for loss of use of the building. (*Id*. at p. 331.) The insurer then sought to assert its subrogation rights against both the contractor and the contractor's design consultant. (*Id*. at p. 331.) The owner and the contractor were parties to essentially the same AIA form contract as in this case (except that it was the 1992 edition, rather than the 1987 edition). (*Id*. at p. 332 & fn. 4.) Accordingly, paragraph 11.3.3 provided that the owner waived any claim for loss of use, but only against the contractor, whereas a separate waiver of subrogation provided that the owner waived any claim that was covered by property insurance against the contractor, the architect, and "consultants." (*Id*. at p. 183.)

The appellate court held that loss-of-use insurance was not "property insurance" within the meaning of the subrogation waiver; accordingly, the insurer could proceed against the consultant for loss of use, although not for physical property damage. (*Best Friends Pet Care v. Design Learned*, *supra*, 823 A.2d at pp. 338-340.) It seems to have reasoned that the owner was required to purchase property insurance, which had to "'insure against the perils of fire and extended coverage and *physical loss* or damage,'" (*id*. at p. 338, italics added); thus, it found "no indication" that property insurance was "meant to include intangible property such as reimbursement for loss of use." (*Ibid*.) It

also noted that "the contract expressly addresses the matter of loss-of-use insurance" in paragraph 11.3.3. (*Id*. at p. 339.)

The fact, however, that the owner must buy "property insurance" providing a certain minimum level of protection does not mean that that such protection is all that the term "property insurance" encompasses. While some physical damage is necessary to trigger property insurance coverage, it does not necessarily define the extent of that coverage. For example, "[b]usiness property insurance policies often cover losses from 'interruption of business' resulting from damage to or destruction of the insured property caused by a loss covered under the policy." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2007) ¶ 6:289, p. 6B-40.)

Most glaringly, the *Best Friends* court seems to have overlooked the fact that all of section 11.3 -- including paragraph 11.3.3 -- is headed "Property Insurance." Thus, when the court said there was "no indication" that property insurance could include insurance for loss of use of property, it overlooked one very strong indication. While paragraph 11.3.3 does deal separately with loss-of-use insurance, paragraph 11.3.2 likewise deals separately with boiler and machinery insurance; yet both of these are simply subtypes of property insurance.

We therefore conclude that, even assuming the Insurer did reimburse the Owner for business interruption or loss of use, paragraph 11.3.7 bars it from recovering this sum from the Architect as well as from the Contractor and Subcontractor.

VI

DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal against the Insurer.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.